MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Seventh Session
March 18, 2013

The Committee on Judiciary was called to order by Chairman Jason Frierson at 9:10 a.m. on Monday, March 18, 2013, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at nelis.leg.state.nv.us/77th2013. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman Jason Frierson, Chairman
Assemblyman James Ohrenschall, Vice Chairman
Assemblyman Richard Carrillo
Assemblywoman Lesley E. Cohen
Assemblywoman Olivia Diaz
Assemblywoman Marilyn Dondero Loop
Assemblyman Wesley Duncan
Assemblywoman Michele Fiore
Assemblyman Andrew Martin
Assemblywoman Ellen B. Spiegel
Assemblyman Jim Wheeler

COMMITTEE MEMBERS ABSENT:

Assemblyman Ira Hansen (excused)

GUEST LEGISLATORS PRESENT:

Senator Tick Segerblom, Clark County Senatorial District No. 3

STAFF MEMBERS PRESENT:

Dave Ziegler, Committee Policy Analyst
Linda Whimple, Committee Secretary
Gariety Pruitt, Committee Assistant

OTHERS PRESENT:

Dan Silverstein, Deputy Public Defender, Clark County Public Defender
Scott Coffee, Deputy Public Defender, Clark County Public Defender
Michael Pescetta, Private Citizen, Las Vegas, Nevada
Marlene Lockard, representing the Nevada Women's Lobby
Mike Patterson, representing the Religious Alliance in Nevada
Nancy E. Hart, President, Nevada Coalition Against the Death Penalty
Vanessa Spinazola, representing the American Civil Liberties Union of Nevada
John T. Jones, Jr., representing the Nevada District Attorneys Association
Christopher J. Lalli, Assistant District Attorney, Office of the District Attorney, Clark County
Keith Munro, Assistant Attorney General, Office of the Attorney General
Ronald P. Dreher, representing the Peace Officers Research Association of Nevada
Robert J. Daskas, Chief Deputy District Attorney, Office of the District Attorney, Clark County
Marc DiGiacomo, Deputy District Attorney, Office of the District Attorney, Clark County

Chairman Frierson:
[Roll was taken. Protocol was explained.] Welcome, everyone. We have one bill on the agenda for today. I want to make sure all of you are aware that we may have to briefly interrupt the hearing at some point to introduce a number of BDRs. I will open the hearing on Assembly Bill 160 and invite Mr. Ohrenschall to introduce his bill.

Assembly Bill 160: Revises provisions governing the death penalty. (BDR 14-2)

Assemblyman James Ohrenschall, Clark County Assembly District No. 12:
Assembly Bill 160 will probably not get a lot of press, and you probably have not heard too much about it, but in many ways I think it may be the most important bill this Committee might hear this session.

I personally do not think the death penalty works for Nevadans. I think the time has come that we realize it is a luxury we really cannot afford anymore. All one needs to do is look around at the different studies in our state and around the rest of the country. We see that it is a very costly sentence; costly to our taxpayers from the prosecution side and the defense side. In terms of violent crime, it does not achieve the deterrent effect that we would hope for. Assembly Bill 160 is not a bill that proposes to abolish capital punishment in Nevada. It would leave capital punishment as a sentence in Nevada; however, death sentences would be rarer in Nevada. The way I see the death sentence being carried out, if A.B. 160 passes, is that the worst of the worst would receive it.

This is a bill very similar to a bill that was proposed by the Judiciary Committee at the 76th Legislative Session which, unfortunately, did not make it out before the deadlines. Because it was a bill that I cared about so much and felt it deserved another hearing, I decided to reintroduce it before the last session ended.

I have some really top-notch practitioners in the field who will speak to the bill, and I am also accompanied by my friend and the chairman of the Senate Judiciary Committee who came here today because this issue is also very important to him.

Chairman Frierson:
I think it would be helpful if you described the provisions that are in the sections of the bill, and if the Committee members have questions, we can go through them then. If you have folks in particular that you want to testify, you can certainly call them up.

Assemblyman Ohrenschall:
Section 1 deals with the scenario of when a jury is unable to reach a unanimous verdict as to the sentence to be imposed. Right now, if the jury cannot reach a unanimous verdict, a district judge has the power to impanel a new jury and try to see if the new jury might be more open to imposing the death sentence. If passed, section 1 of A.B. 160 would require that in the scenario where a jury is not able to reach a unanimous verdict, the district judge would have these options: life imprisonment without the possibility of parole; life imprisonment with the possibility of parole; or a definite term of 50 years.

Section 2 deals with the aggravators. The way that we are tinkering with the current aggravators in law is to try to make sure that we reserve this final penalty for the worst of the worst.

I think this may be a good time for me to bring up Senator Segerblom and Dan Silverstein.

Chairman Frierson:
Please do.

Senator Tick Segerblom, Clark County Senatorial District No. 3:
To give a little history to those of you who are new to the Judiciary Committee or to the Legislature, during the 76th Legislative Session we had a bill that asked for a study of the death penalty. That bill passed the Legislature, but was vetoed by the Governor. That was just to try to look at the cost of the death penalty and whether it was feasible in terms of what the results were. As you know, the death chamber, which was at the Nevada State Prison in Carson City, is closed and no longer functions. The Governor has $700,000 to build a new death chamber at the Ely State Prison. Right now, even if someone gets to that point, in reality there is no way to put them to death.

The other thing about the death penalty is that as soon as a person is charged with the death penalty, the defense cost and the prosecution cost is essentially doubled. There have to be two attorneys on both sides, they have to hire experts, they have to prepare both for defense of the trial, and then they have to prepare to explain why that person should not get the death penalty if the person is convicted. The costs are astronomical.

The testimony two years ago was that we have more people that are being prosecuted with the death penalty than they have in all of Los Angeles County. For some reason, the system is broken and in Clark County particularly, the costs are just astronomical. I think that in Washoe County there is one person being charged with the death penalty; in Clark County there are 60 or 80 people.

We have to figure out a way, if we cannot get rid of the death penalty, to at least start to restrict the circumstances under which it is charged so we can start to look at the cost of this. As it currently stands, even if we spend millions of dollars in legal fees and prosecute someone, we could not put them to death in Nevada if we wanted to. So they are going to go to prison, and they are going to be stuck in solitary confinement for the rest of their life, which is essentially what the bill would do anyway.

I urge you to look at this. This bill just tightens down the circumstances under which the death penalty can be charged. It is not a huge percentage, but it might knock out 20 percent of the people who are currently being charged. I figure that at half a million or a million dollars a pop, the cost savings alone,

just by this bill, could support a lot more teachers and a lot of other things like building roads. I am committed, if you can get it out of this side, that we will work hard in the Senate to get it out of our side, and hopefully the Governor will realize that the time has come.

Assemblyman Carrillo:
These are all capital murders, correct?

Senator Segerblom:
Yes, by definition.

Assemblyman Carrillo:
In regard to page 2, section 1, subsection 1, paragraph (b), why the addition of life with the possibility of parole after 20 years?

Senator Segerblom:
You would have to ask the sponsor about the specifics.

Assemblyman Carrillo:
Whoever wants to take the question.

Assemblyman Ohrenschall:
My recollection for that rationale was exactly what Senator Segerblom said. When a death sentence is imposed right now it is turning into life, although not life with the possibility of parole.

Dan Silverstein, Deputy Public Defender, Clark County Public Defender:
The reason that the sentences in section 1 are set forth the way they are is because these are the current sentences that are in the statute for first-degree murder. In any non-death penalty case, these three sentences are the sentences that are available to the sentencer, and that is why those sentences are in section 1.

Assemblyman Wheeler:
As it stands now, does this preclude the judge from impaneling a new jury to get to a unanimous verdict, or is he still able to do that and have a choice to go to these other sentences?

Assemblyman Ohrenschall:
The way I read section 1 of A.B. 160, if a unanimous verdict is unable to be obtained on that first go-round and they come back to the district judge and let him know that, he would not be able to impanel a new jury. I am getting a nod from Mr. Silverstein.

Assemblywoman Cohen:
As it stands now, when there are juries that cannot come to a decision, are the judges impaneling new juries?

Dan Silverstein:
In every case that I am aware of, except for one. When the jury has been hung on the penalty option, the judge impanels a new jury. The only case that I am aware of where the judge actually chose not to impanel a new jury to impose the sentence after the jury was unable to reach sentencing option in the penalty phase was the *Nunnery v. State* [127 Nev. Adv. Op. 69, 263 P.3d 235 (2011)]. There may be others that happened before I began to practice, but that is the only one I am currently aware of.

Assemblywoman Cohen:
How often are there hung juries on the first go-round?

Dan Silverstein:
That is something that does not happen with a great deal of frequency. It happens often enough for it to be an issue that we felt needed to be addressed in the bill. The problem with the way it is currently set up is this was contemplated in 1977 when the death penalty was reinstated after the United States Supreme Court struck down the death penalty in 1972. It was brought back in 1977, and at that time, the Nevada Senate considered having a new jury impaneled to decide the sentence in the event of a hung jury. They decided that was not a good option because they did not feel that a new jury would have a full flavor of the trial, they would not have heard all of the trial facts, and they actually felt that that jury would not be able to make a rational decision based on just hearing the penalty evidence. At that time in 1977, in the event of a hung jury, they decided to impanel a three-judge panel. They would have three district court judges decide on the sentence in the event of a hung jury.

About ten years ago, the United States Supreme Court held that the three-judge panel was unconstitutional, and that it was not fair for judges to be making those decisions. So we ended up going back to the option that was considered and rejected in 1977. This bill goes back to what we feel is the fair way to handle a hung jury situation when there is a jury which is unable to unanimously agree that death is the appropriate sentence. We think it functions as a message that this case is not appropriate for the death penalty and is not the worst of the worst.

Assemblywoman Spiegel:
Are there times when the criminal feels so guilty about committing the murder that they actually want the death penalty? If so, would this bill impact that?

Dan Silverstein:
There are certainly times when defendants want to plead guilty. There are times when defendants confess to the police even before they get to trial. This does not impact in any way their ability to plead guilty. If a defendant so desired, he could certainly enter a plea of guilty and proceed straight to the penalty phase. This section does not affect that in any way.

Chairman Frierson:
Are there any other questions? [There were none.] Mr. Silverstein, are you finished?

Dan Silverstein:
No, I had more remarks.

Chairman Frierson:
Please proceed.

Dan Silverstein:
I want to make it clear that A.B. 160 does not abolish the death penalty in Nevada. It does not even come close to abolishing the death penalty in Nevada. This bill does not remove a single aggravating circumstance. All 15 of the aggravating circumstances in Nevada remain intact. If this bill was the law, and had been the law of the land since 1977, every single inmate who is currently on Nevada's death row would still be eligible for the death penalty. This bill would not take a single death row inmate off of death row. The people who received a death penalty in cases where a jury felt that that sentence was appropriate, all of them would still be eligible for the death penalty.

This bill cuts down on the substantial cost of litigating death penalty cases by defense attorneys by cleaning up some of the language in our statute that causes problems. It is vague, it is ambiguous, and has possibly been expanded beyond the intent of the provision. Some of these circumstances invite a great deal of litigation for a jury every time they are invoked by the district attorney. Nevada can cut some of these litigation costs without interfering with the availability of the penalty in appropriate cases. This bill is the means by which to do that.

Let me briefly explain why I think the death penalty is an area that is ripe for cost-cutting. If this body is inclined to cut costs, this is the place to do it.

The death penalty is implemented in such a small fraction of cases. You are going to hear from Mr. Lalli from the Clark County District Attorney's office, who is going to tell you that based on the number of murders in Nevada since 1977, the death penalty has only been imposed in 2.8 percent of the murder cases in this state. We are not getting the bang for the buck out of this penalty. This is not an efficient or effective use of taxpayer money, and that is why cutting down on some of the litigation surrounding the death penalty is a wise way to cut costs to the taxpayers.

I want to make it clear that capital defense attorneys do not raise issues with these statutes just because we like being difficult. We are obligated to raise these issues. Several years ago, the Nevada Supreme Court put forth a set of capital defense standards called ADKT 411 Nevada Indigent Defense Standards of Performance. Those standards from our Supreme Court instruct capital defense lawyers that they must raise any meritorious issues in a capital case. Not just something that may be meritorious today, but something that may find merit at some point in the future. Standard No. 10 in those standards imposes the duty to assert legal claims, and requires us to acknowledge "the importance of protecting our clients' rights against later contentions that the claim has been waived . . . ." In other words, if we do not raise it, it will have been waived in the future if it is later overturned, or if that statute is later ruled unconstitutional. We have to anticipate and litigate every potential issue, not just to prepare the case for trial, but to prepare it for future appeals. This is what our clients are entitled to under the Sixth Amendment, and the Nevada Supreme Court has told us that we are not doing our jobs unless we raise and litigate these issues.

There are a number of issues with Nevada's current capital sentencing scheme. In 1972, the death penalty was ruled unconstitutional in this country, and it was reinstated four years later under certain conditions—it was a conditional reinstatement. The United States Supreme Court made it clear that the death penalty could only be imposed under a system that truly limited the death penalty to the worst of the worst offenders, and they did that by requiring a list of aggravating circumstances. The purpose of those circumstances is to genuinely narrow the class of those first-degree murders eligible for the death penalty. A scheme that does not perform that narrowing function which catches too many first-degree murders within the net, such a scheme is not constitutional. That is why any time there is any ambiguous or vague language in a statute, or language that has been stretched beyond the breaking point of the intent, it is the subject of intense litigation.

Every time we litigate these issues, there are costs associated with it. We file a motion which could take several hours, the district attorney has to prepare an

opposition, we prepare a response, we go to court, there is time waiting for the court, and the court has to spend hours to review the motion and to research the issues. There are substantial costs involved with litigating these issues. By passing this bill and taking away some of this vague language, you are also going to take away a good portion of this litigation and a good portion of the costs that are associated with death penalty cases.

I would like to explain the changes in the bill and the reasoning why the changes were put into A.B. 160. I am not going to go through section 1 because I think we have adequately covered it. If there are other questions on section 1, I will be happy to answer them.

I will go through section 2 as briefly as I can. In section 2, subsection 1, the first change made to the aggravating circumstances is to remove the "under sentence of imprisonment" language and change it to "incarcerated in a correctional institution or facility." I think that it is clear, from the "under sentence of imprisonment" language, this aggravator was intended to apply to people who are imprisoned. That makes sense. It is good policy to protect guards and other inmates in the very dangerous prison setting. Unfortunately, the aggravator in this language has been stretched far beyond that, and has now been held to include anyone who is on parole, probation, or any sort of suspended sentence. This aggravator could conceivably be used, and has been used, to apply to someone who has never spent a day in prison. What is most troubling about the language in this section is that in a different context, this term "under sentence of imprisonment" has been held to mean the exact opposite. Defendants who were "under sentence of imprisonment" are generally entitled to credit for the time that they have served in custody. The people who are on probation are not considered to be under sentence of imprisonment when we are talking about getting them good time credits. So someone who is on probation is under a sentence of imprisonment when it comes to the death penalty, but not under a sentence of imprisonment when it comes to the benefit of earning credit for time served. We think that it is an unfair situation, and we litigate it just about every time it comes up. Under this bill, that aggravator becomes clear to everyone what it means, and it is closer to the actual intent of the provision.

Subsection 2 is normally known as the prior violent felony aggravator, and it is aimed primarily at defendants who have a prior criminal history. That makes sense. It is someone who has a prior violent criminal history that will have an aggravating circumstance, but the way that the statute is currently written, a defendant does not need any prior criminal history in order to be eligible for the death penalty. This section has been frequently applied to defendants who have committed a violent felony contemporaneous, or along with the murder.

So someone who is charged with murder and robbery in the same case, now has an aggravating circumstance. Not because they have a prior criminal history, but because they have a contemporaneous crime also charged with the murder. This cause exposes far too many defendants to capital punishment, because it puts their eligibility for the death penalty really in the hands of the prosecuting attorney. If the prosecuting attorney can find another violent felony to charge them with along with the murder, they now have an aggravator, and they have a potential death case.

Subsection 3 is untouched by A.B. 160. Subsection 4 is the felony murder aggravator, and this makes it an aggravating circumstance if you commit murder in the course of certain enumerated felonies. The first change is to remove "burglary". This is not because we think it is a good thing to commit burglary. Actually, home invasion is when someone breaks into someone's home to kill them, and it is still covered under this aggravator. The problem with the burglary being included is that the state can charge burglary based on someone entering a building with the intent to commit murder. So you have a situation where the murder itself becomes the basis for the burglary and then that burglary becomes the basis for a death sentence. It is kind of a circular logic. You have a situation where anyone who commits a murder inside any building becomes eligible for the death penalty. That is something that makes the death penalty far too broad, applies to far too many defendants, and is a subject of constant litigation. We believe that is something that should be changed.

We have also removed the language that exposes an accomplice to the death penalty in situations where they knew, or had reason to know, that a life would be taken or lethal force would be used. That language is broad enough to cover the situation where you have an accomplice who is acting as a lookout, and who has no intention whatsoever that a life be taken. That is very broad language, and it has been used to apply to an accomplice who had no intention whatsoever. We do not believe the death penalty is appropriate in a situation where someone does not have the intent that a life be taken. That is not limiting the death penalty to the worst of the worst. That language has been removed.

The last change to subsection 4 is a codification of a holding of the Nevada Supreme Court case, *McConnell v. State* [120 Nev. 1043, 102 P.3d 606 (2004)]. The addition to subsection 4 is just a restatement of the holding of *McConnell v. State*. At the 76th Legislative Session, Chris Owens was here from the Clark County District Attorney's office, and he told this body that the *McConnell* decision had been overruled. That is not true. The *McConnell* decision has not been overruled, regardless of what was said at the last session.

It is still the law, and A.B. 160 makes sure that that law is codified in this statute.

The next change is in subsection 5, "The murder was committed to avoid or prevent a lawful arrest . . . ." We have removed the language "avoid or prevent a lawful arrest," because this aggravator was intended to apply to situations where someone has killed to avoid arrest or to escape from lawful custody of a police officer. But this "avoiding lawful arrest" language has been interpreted very broadly to the point where it could cover virtually every murder case. The U.S. Supreme Court has said that the prosecutors can use this lawful arrest aggravator if the victim is someone who could have identified the perpetrator. If you think about it, that is pretty much every murder case. In every murder case, the victim is likely someone who could have identified the perpetrator of the crime. This aggravator is simply too broad. It could apply to any first-degree murder case. It does not narrow anything, and it does not perform the function that the U.S. Supreme Court said that it must.

Assemblyman Wheeler:
Has there been a study about how much the cost would be and how much would be saved? I am also wondering why there is no fiscal note on this, if the cost savings are substantial.

Dan Silverstein:
There was a bill to have a formal cost study done throughout the state of Nevada on the death penalty. At that time, the district attorney's office did not oppose a cost study. The bill went to the Governor's office and was vetoed. An informal cost study has been prepared; however, I do not have the numbers for you as to exactly how much money this is going to save. I can tell you that every time any one of these issues is litigated in court, it costs the taxpayers money. Most of these death penalty cases are publicly financed on both sides—both the prosecutors and the defense attorneys. Every motion that is filed costs the taxpayers money. Unfortunately, I do not have specific numbers for you, but I do know how much time I spend litigating these issues, and the hours I spend and what I would save, and other prosecutors would save, by not having to respond to these same issues over and over again.

Assemblyman Ohrenschall:
As to a fiscal note, no one from Fiscal ever contacted me about releasing this for a fiscal note. I do not know if they do not believe there is a fiscal effect or they do not look into projected savings. While the cost study bill was vetoed, if you go to the website <www.deathpenaltyinfo.org>, it cites a study conducted at the University of Nevada, Las Vegas, by Dr. Terance Miethe of the Department of Criminal Justice. He cited that Clark County public defense

attorneys spend an average of 2,298 hours on a capital murder case compared to an average of 1,087 hours on a noncapital murder case—the difference of 1,211 hours or 112 percent. Defending the average capital murder case in Clark County costs $229,800 for a public defender, and $287,250 for an appointed attorney. The additional cost of capital murder cases was between $170,000 to $212,000 per case compared to the cost of the noncapital murder case in Clark County. Dr. Miethe found that the 80 pending capital murder cases in Clark County will cost approximately $15 million more than if they were prosecuted without seeking the death penalty. Clark County cases that resulted in the death sentence that concluded between 2009 and 2011 took an average of 1,107 days, or just over three years to go from initial filing to sentencing. In contrast, cases that resulted in life without parole took an average of 887 days, or 2.4 years to go from initial filing to sentencing. Of the 35 completed cases in Clark County between 2009 and 2011, where notice of intent to seek the death penalty was filed, 69 percent resulted in a life sentence. Nearly half, 49 percent, ultimately resulted in a sentence of life without parole, and the next most common disposition with 20 percent, was a sentence of life with parole. Only five of the 35 cases, 14 percent where they were seeking a death penalty, resulted in an actual death sentence. That is only a microcosm of the state—it is Clark County—but as Senator Segerblom said, that is where the majority of the death sentences are being sought by the prosecution. When you look at Dr. Miethe's analysis, which is very small, it does seem that there is a lot of money being spent for a very small amount of success; if you consider it a success.

Assemblyman Martin:
How many people has Nevada put to death in the past ten years? You are giving a lot of statistics very quickly, but it seems that your point about the expense of it versus the result does not seem justified, no matter how emotionally one might feel about imposing the death penalty. The question is, how many people have actually been executed?

Assemblyman Ohrenschall:
That is a statistic I do not have with me, but I am happy to find it and get it to you and the other Committee members.

Scott Coffee, Deputy Public Defender, Clark County Public Defender:
Since the reinstatement of the death penalty in the mid-1970s, there have been 12 death sentences that were carried out. Eleven of those were classified as volunteers. We executed one nonvolunteer in Nevada since 1975.

Assemblyman Martin:
Twelve people in the course of about 37 years—I know this is not a money committee, but in terms of a policy affecting cost, the cost must be a 10:1 ratio or 20:1 ratio versus life in imprisonment. Does anyone know?

Scott Coffee:
The cost is astronomical. The Miethe study which was mentioned by Mr. Ohrenschall was only directed at attorney costs at the trial stage of the proceedings. It did not include appellate cost, it did not include federal cost once it gets to federal appeal, if we have a death penalty that is actually handed down by a jury. It did not include the cost for experts, which can easily run as much as the attorney cost in a capital case. It did not include additional investigation costs, which run into the hundreds of thousands of dollars. This is the simplest way to think about capital punishment that I have been able to come up with. When it is a death penalty case, you have to investigate a person's entire life from birth—perhaps even before birth—all the way through the crime. When you have a murder case, you are talking about 20 minutes or maybe a day. The investigation costs from the defense side are astronomical.

Assemblyman Carrillo:
You mentioned volunteer versus nonvolunteer. Would you clarify that?

Scott Coffee:
Volunteers are people who have willfully given up on the appellate process and chosen not to proceed further with court proceedings. That would happen at the federal stage. That would be the situation where they have given up their appellate rights and are seeking to say things in court.

Dan Silverstein:
Subsection 6 is known as the monetary or pecuniary mean aggravator. I believe the original intent of this section was to apply to the murder-for-hire situation where a hit man kills for money. That was the intent for being an aggravating circumstance. It has been expanded well beyond that, and is now used in situations where the killer takes a dollar bill off the victim after the killing, takes the wallet, or even receives proceeds from an insurance policy. I do not believe that that was the way this aggravator was intended to be applied. This bill simply clarifies exactly what the aggravator means and what it does not mean.

Subsection 7 is unchanged by the bill. The final change that A.B. 160 performs on the aggravating circumstance is subsection 8. This is the torture or mutilation aggravator. The primary change is to remove the word "mutilation" from the aggravator. The word "mutilation" has caused all sorts of problems and litigation in the courts, because the word "mutilation" has been defined to

mean disfigurement. Just about any killing involves some disfigurement of the victim. Does it apply to a stab wound or a gunshot wound? The argument could certainly be made that it does when mutilation is defined broadly to include any disfigurement. It is arguable that any injury that causes death satisfies the definition of mutilation. It has even been held to apply to injuries that take place after the killing has already been committed. It is our feeling that a term this broad and expansive that could apply to just about every case has no place in our death penalty law, and it invites litigation just about every time it is used.

The definition of torture that is in A.B. 160 is a definition which has been provided by the Nevada Supreme Court. That is a codification of a definition that is already used and given to juries in the state of Nevada. These are the changes that this bill proposes. I am sure that the opponents of this bill are going to come up and tell you that the sky will fall if this passes; that this will make murder practically legal in the state of Nevada; and that murderers will be roaming the streets. Despite all of these changes, not one person who is currently on death row would be spared by this law. All of them would still be eligible for the death penalty. That is why I believe this is a wise and good bill. It cuts down on tremendous litigation cost; the most often litigated aggravating circumstances, while retaining the power of the district attorney to seek the death penalty in those cases where it is appropriate. There is no better evidence of that than the fact that everyone who has received a death penalty in Nevada would still be eligible for one if this bill was the law.

This bill was proposed two years ago, and Chris Owens from the district attorney's office called this bill a "defense attorney's dream." This bill does not abolish the death penalty; in fact, to the extent the defense attorneys make their living off of litigating vague and ambiguous statutes, the current death penalty law is far more of a defense attorney's dream than A.B. 160. This bill cleans up many of the problems with our current law, and takes away a small fraction of the district attorney's discretion, discretion that would not remove a single death row inmate from death row. The worst of the worst remain eligible for the death penalty under this bill.

There has been a rash of mass shootings throughout the country, and I know there might be some concern that if this bill passes and such a thing were to happen in Nevada, that those mass shooters would not be eligible for the death penalty. That is not true. Adam Lanza would have been facing about 40 or 50 aggravators, even if A.B. 160 was the law. There is an aggravator that covers multiple killings. The worst of the worst crimes are still covered if this were to be the law. Across this country, states that are in poor economic conditions are beginning to realize that capital punishment is not worth the cost. New Mexico,

New Jersey, and Illinois have realized it. Last year Connecticut realized it, and a few days ago Maryland realized it. This bill does not do anything close to abolishing the death penalty, but it is a smart and effective way to save money by limiting the death penalty in a reasonable and moderate way.

Assemblywoman Fiore:
I know that we are not a money committee, but most of your talk was about saving and being cost-effective. When you have a family where the husband was tied up and the mother and little girls were brutally murdered in front of him, I do not really think some people care about cost when we put people to death.

Dan Silverstein:
You are absolutely right. In the situation you described, that heinous offender would still be eligible for the death penalty if this bill were law. Tying someone up would be a murder committed in the course of a kidnapping. That aggravator remains untouched. You mentioned the killing of small children. The aggravator for murders committed on a person under the age of 14 years remains untouched. That would be two separate aggravators. If the situation you described had happened, that would have been considered multiple killings. That is a separate aggravator in itself. Even in the situation that you described—and I agree that that is a heinous situation—that person would still remain eligible for the death penalty if this were to be the law. This bill does not remove the death penalty as an option for the heinous killings. It removes the death penalty as an option for the people who were maybe on the edge, the people where it is not the worst of the worst. It narrows it in the manner that the U.S. Supreme Court has prescribed, to make sure that the penalty is only used for the worst of the worst offenders.

Chairman Frierson:
Are there any other questions for Mr. Silverstein or the presenter of the bill? [There were none.] Mr. Coffee, if you would proceed with your comments.

Scott Coffee:
Having spent 20 years as a criminal defense attorney in the public defender's office and doing this sort of work for more than 10 years, one of the things this bill does is provide me with some clarity. I have litigated a number of death penalty cases and represented 60 or 70 people through conclusion in murder cases. I am a little embarrassed to say this, but if you look at section 2, subsection 8, with the way this statute is currently drafted, I cannot tell you what mutilation is. I just cannot tell you. Is it one shot, three shots, or five shots? It is not particularly clear. Because it is not clear, there are vagaries that lead to litigation in every case. It comes up time and time again.

Does "under sentence of imprisonment" mean a person on probation for having marijuana or methamphetamine in his pocket? It has been interpreted that way, but I do not think that is what the Legislature ever contemplated.

I had the opportunity to read the legislative history when the death penalty was reintroduced in Nevada. It is fairly lengthy—200 pages. Many of the things we are talking about were not contemplated when this was adopted. I think the reason they were not contemplated is because they thought the language was clear. For example, I think everyone assumed "under sentence of imprisonment" meant someone who was shoving a guard, or killing another inmate with a stone. They did not think it would be stretched and pulled the way that it has been. It is a natural progression. We have zealous advocates on both sides of the issue. We have prosecutors who will speak to you in a few moments. They use the tools they are given, and they do it zealously once the decision to seek the death penalty has been made. It is natural for them to take every advantage and move things to the edges if possible when they seek the death penalty. So they have used these provisions in ways that I do not think anyone envisioned from reading the legislative history. This bill curtails those sorts of things.

I know we have talked a lot about numbers. Senator Segerblom had mentioned Los Angeles County. That is a good example. It is an average county in the United States. Los Angeles County has somewhere in the mid-30s in pending death cases. Clark County has somewhere in the mid-60s. Los Angeles County has five times our population. We have a number of pending death cases. I will say that the current administration at the Clark County District Attorney's office has been trying to resolve a number of these death cases, and that is laudable. Past administrations have not done the same, and we still see some of the charging decisions the past administration made. If I were a prosecutor, I would probably do the same thing. I would stretch the law if I decided someone deserved the death penalty. I would stretch it every way that I could. It is a way that was never contemplated by the legislative adoption of this scheme. It has taken 30 years to get to the confusing mess that we have as far as case law. This would correct some of that.

Assemblyman Duncan:
The numbers that we are citing in the Committee today—are we talking about cases that are fully litigated that go to the trial stage and then there is a jury verdict? In terms of the practical practice of law as a defense attorney, are there cases where it is just so clear-cut that you would not litigate any of these aggravators? I am trying to determine if this will really clear up a lot of these aggravating circumstances and really lower the amount of litigation on these certain aggravators. Do you still get a sense that to be effective as a defense

attorney, you are still going to be litigating most of these aggravators on the fringes as they are?

Scott Coffee:
We are talking about cases that are pending for trial where the state has actively decided to seek the death penalty. A number of those cases perhaps have, or are going to be, resolved by some kind of plea resolution. A number of them will be resolved by trial with something less than a death penalty. From the defense side, the plea resolution does not save that much in cost. It saves cost at the trial level, but you still have to do the background investigation, and the mitigation investigation, and you still have to hire experts. A lot of times the resolution comes after we have magnetic resonance imaging, psychological testing, and those sorts of things done, so the expense is still there. But by simply signing off on the piece of paper, our investigative duty as defense attorneys kicks in, and there is a huge cost associated with it, even if the cases do not go to trial.

There are a lot of aggravators that are so clear-cut, I would not even litigate. For example, one of the aggravators has been a previous conviction of murder. If someone has a prior murder conviction, I am not going to litigate and say that is not a viable aggravator. There is just no basis for me to get there. I have to have some kind of basis that is either going to help me make a record for the appellate court, later for the federal court, or that I have a chance on winning, or I am not going to raise it. At least in my practice, I am not one of those persons who raises everything including things that they think have no merit. The point is, when you have vague statutes, it is hard to figure out what has merit and what does not, and we are obligated to raise these things.

Assemblyman Duncan:
In terms of right now with the proposed amendments to these sections, what percentage of your cases do you feel deal with these types of aggravators that they are trying to clarify?

Scott Coffee:
That is a very good question. I do not have an answer. With a bill that addresses so many different aggravators, my gut reaction is that it would be a substantial number; better than half perhaps. Although it might not affect the filing in every case. When they file a death notice, they are going to list the aggravators. There might be two or three aggravators in any given case, and the things that we are talking about amending are aggravators that we see in numerous death notices. Does the amendment affect every filing? I could not tell you that, and would not say that off the top of my head.

Dan Silverstein:
When this bill was proposed two years ago, we went through every pending death penalty case. In 97 percent of the cases, this bill would affect at least one aggravator. In other words, 97 percent of the cases pending as of two years ago involved at least one issue that would have to be litigated which would have been removed based on this statute.

Chairman Frierson:
Are there any other questions for Mr. Coffee? [There were none.]

Michael Pescetta, Private Citizen, Las Vegas, Nevada:
I am a lawyer and practice in the area of death penalty law, primarily in habeas corpus in state and federal courts. I am appearing today on behalf of myself. I would like to make it clear, as I always do, I am not representing the federal public defender, which is my employer, in this testimony. These are my opinions only.

I do not think I can really improve much on Mr. Silverstein's analysis of the provisions in the bill. I can attest to the fact that the statistics we put together in the last two sessions involving the application of the death penalty indicate that the imposition of the death penalty in Nevada is quite error prone. About 26 percent of the cases in which the death penalty is actually imposed result in a legal ruling that it was imposed improperly. That may be on issues of ineffective assistance of counsel, which is a very common one. Sometimes it is failure of the prosecution to disclose evidence, which is a violation of *Brady v. Maryland* [373 U.S. 83 (1963)]. I think the most common one is misapplication of aggravating factors. When we have aggravating factors that are vague enough to be employed in virtually every case, I think that is one of the major reasons why we have such a high error rate. There is no other class of cases in which the error rate, as I understand it, is anywhere near this high.

I would like to touch on one of the aggravating factors that Mr. Silverstein referred to, which is the mutilation requirement in section 2, subsection 8. While we may all have some kind of lay opinion about what mutilation means, the definition, which is given to a jury in applying this aggravator, is taken from the crime of mayhem. The typical jury instruction states something to the effect of—I am quoting an instruction that was actually given—"In order to find mutilation of a victim, you must find that there was mutilation beyond the act of killing itself," but that mutilation means, "to cut off or permanently destroy a limb or essential part of the body, or to cut off or alter radically so as to make imperfect." It is very hard to commit a murder without making some part of the victim's body altered or imperfect.

There have been many cases in which the application of this aggravator has been in situations where there is clearly, or at least apparently in my view, no intent to commit mutilation. This is separate from the killing. There is no intent requirement in the statute as it has currently been construed. The Nevada Supreme Court has tolerated this particular definition of mutilation in cases where someone is killed by multiple stab wounds. We have cases that have been litigated where the prosecutor argues to the jury that the stab wounds punctured a vital organ and that made that organ imperfect and radically altered, and although that is what actually killed the victim, that is what constitutes mutilation. That is a factor which could be applied in virtually any homicide case. It is not applied in every homicide case, but it is invoked periodically, and jurors do accept it and find mutilation, and base a death sentence upon that aggravating factor. It is so vague and so clearly applicable to practically any homicide that it does nothing to narrow the scope of the death penalty. I am bringing it up just to say as a practical matter, and as someone who has to litigate these issues day in and day out, this is an area in which applications of the death penalty based on some of these overbroad aggravating factors causes a great deal of work. Unfortunately, this is one of the mainstays of my practice. I think that in order to make this death penalty fairer and more clearly applicable only to the worst of the worst homicides, this is a desirable bill, and I support it.

Chairman Frierson:
Are there any questions for Mr. Pescetta?

Assemblyman Duncan:
My question is actually for Mr. Silverstein. Would you explain the 97 percent figure again? How many of those cases hinge solely on one of these aggravators that are, in your words, ambiguous?

Dan Silverstein:
The reason I said 97 percent is because there were 80 pending death penalty cases the last time this bill came before the Committee. We went through the 80 cases and looked at every death penalty notice, which is a list of the aggravating circumstances. Chris Owens from the district attorney's office said that all 80 cases would still be eligible for the death penalty, so there was a dispute there. Essentially, this bill would have removed or negated at least one aggravator in 77 of the 80 cases. The reason that I say that the bill would remove litigation in the vast majority of the cases is because every one of those cases that has one of the aggravators pinpointed by this bill is an area that most likely is going to be aggressively litigated, not only in the trial court, but through all of the appellate courts, state court, and federal court. The defendant only needs to have one aggravating circumstance to be eligible for the death penalty.

So if the bill took one aggravator away from a three-aggravator case, he would remain eligible for the death penalty without the litigation.

Assemblyman Duncan:
Out of those cases, were there any cases that would have dropped off fully and no longer been death penalty cases?

Dan Silverstein:
This was actually a point of contention between myself and Mr. Owens at the district attorney's office. It was my position that three of the 80 cases would no longer be eligible for the death penalty if this bill had been the law. It was Mr. Owens' position, who actually does the charging and would be the one who interpreted the aggravator, so I would actually take his word over mine. Mr. Owens' position was that none of the 80 cases would be taken off the table; that all 80 would still be eligible for death if this were the law. I guess I would agree with Mr. Owens if he says that he sees some other aggravators in those three cases that I thought would have been taken off the table. Then you have a situation where every single person would still remain eligible for the death penalty. The bill would not keep the death penalty off the table in any of the cases; it would save the cost of litigating these vague and ambiguous aggravating circumstances.

Chairman Frierson:
Would you address the number of death sentences that are imposed by juries versus the number that are actually carried out? There has been testimony that there have been a small number carried out. Why do you think that is the case with respect to this bill? In what way does this bill address the difference?

Dan Silverstein:
I think Mr. Coffee has the exact numbers on that, so I will defer to him.

Chairman Frierson:
It would be argued that this provides some clarification, but it could also be argued that there is no need for this bill because it is not often carried out anyway. I am curious, from both sides, how they see this bill impacting that difference.

Scott Coffee:
There have been around 140 or 150 death sentences in Nevada since 1977. There is currently a death row that stands at about 80 inmates. There have been 12 executions, one of which was a nonvolunteer. Putting that in perspective, a number of cases were overturned, obviously. Mr. Pescetta said the number is 26 percent; I think that is accurate. I have no reason to contest

that. A number of those were overturned because there has been a change of position on aggravators. Someone has alleged an aggravator and then the Supreme Court has decided that maybe that aggravator was not applicable. These situations do not come up in the appellate court if the aggravators are more narrowly defined. I think it saves litigation in those instances in a number of cases. What percentage could I tell you? I do not know for certain, but 26 percent of 140 is 40 to 50 death cases. If half of those were overturned because of aggravating circumstances, you are talking 15 or 20 cases that may have been overturned. *McConnell v. State* is a good example of where they invalidated an aggravating circumstance and then went back and had to reexamine the case and say, "We are not sure if a jury would impose death again."

The other problem with these vague aggravators that has not been touched on—it is kind of a legal technicality—is eventually you end up putting the judges in the spot of deciding whether or not someone lives or dies. Normally the U.S. Supreme Court said it should be done by a jury, but when you allow invalid aggravators to go to a trial court, the Supreme Court is ultimately going to make a decision as to whether or not that aggravator was something the jury relied on or something they did not. You are adding another level of what I would call impropriety to this whole situation by allowing the vagaries to exist.

Chairman Frierson:
When opposition comes up, I will ask that they consider answering the same question as to how this bill is related to whether or not those cases are actually carried out.

Are there any other questions for Mr. Ohrenschall or Mr. Silverstein? [There were none.]

Is there anyone in Carson City to testify in support of A.B. 160? Obviously, this is a passionate issue, and we have representatives from both sides. Try not to repeat things, and certainly try not to read to the Committee. If you have testimony that you would like to submit in writing, we would be more than happy to receive it.

Marlene Lockard, representing the Nevada Women's Lobby:
The Nevada Women's Lobby is a bipartisan coalition of men and women working on behalf of women, children, and families in the state of Nevada. We support this measure because of the economic climate in Nevada, and all of the programs and the needs that require additional funding. We feel that this bill would reduce costs and save money that could more appropriately go to some of those other priorities for the state, education, and others that we all

know were funded inadequately. We are not opposed to the death penalty, but we think that this measure also ensures that it would get the worst of the worst as has already been stated, and reduce the costs of incarceration and the many years on death row. We strongly support this measure.

Chairman Frierson:
Are there any questions? [There were none.]

Mike Patterson, representing the Religious Alliance in Nevada:
I have heard a lot of facts and figures today that I was not aware of, frankly, and based on the cost analysis, it seems to make sense to pass this bill. We are also here in favor from a religious point of view, and all five entities are on record as being against the death penalty. We feel that this is just one step to make sure that someone who might not deserve it is not put to death. That is where our position is on this.

Chairman Frierson:
Are there any questions for Mr. Patterson? [There were none.]

Nancy E. Hart, President, Nevada Coalition Against the Death Penalty:
We support this bill and urge you to pass it because it is a modest, common-sense measure to streamline the list of aggravating circumstances for which a first-degree homicide can be charged with the death penalty. Tailoring the aggravators by providing a definition of torture, by eliminating the vague and overbroad term "mutilation," and by specifying that a prior felony conviction has to be from a separate case, are all practical and reasonable ways to make our death penalty statutes more predictable. You have heard that capital punishment is supposed to be reserved for the worst of the worst. Assembly Bill 160 simply ensures that Nevada's prosecutors are indeed focused on those worst of the worst when it comes to pursuing the most severe and final punishment that society can impose—death. [Continued to read from prepared text (Exhibit C).]

The Coalition's support of A.B. 160 is not about ending the death penalty, and do not be misled into believing that the bill has anything to do with abolishing the death penalty. It is about addressing a couple of the flaws in Nevada's death penalty, which are fixable. Thank you for hearing my testimony.

Chairman Frierson:
Are there any questions? [There were none.]

Vanessa Spinazola, representing the American Civil Liberties Union of Nevada:
American Civil Liberties Union (ACLU) is in support of A.B. 160. It is no secret that the ACLU is against the death penalty. We believe that the capital punishment system is discriminatory, arbitrary, and inherently violates the constitutional ban against cruel and unusual punishment. This is because hundreds of people in the United States have been exonerated from death row. We have one such person in Nevada. In 1996, Roberto Miranda, District Court Case No. CV-98-01121-LDG was given a new trial due to ineffective assistance of counsel, and was exonerated here in Nevada. There is also racial bias throughout the death penalty, all the way from jury selection to the decisions about who faces execution. Again, this bill is not about abolishing the death penalty. We do believe that it more narrowly tailors the way we use the death penalty here in line with the Supreme Court, and therefore we support it.

Chairman Frierson:
Are there any questions? [There were none.]

I am going to take a brief moment to seek a motion to introduce BDR 38-457.

BDR 38-457—Revises provisions relating to foster care. (Later introduced as Assembly Bill 348.)

ASSEMBLYWOMAN DIAZ MOVED TO INTRODUCE BDR 38-457.

ASSEMBLYWOMAN SPIEGEL SECONDED THE MOTION.

THE MOTION PASSED. (ASSEMBLYMAN HANSEN WAS ABSENT FOR THE VOTE.)

I am going to invite anyone in Carson City or Las Vegas who wishes to testify in support of A.B. 160 to come forward. [There was no one.] I invite those who wish to testify in opposition to A.B. 160 to come forward.

John T. Jones, Jr., representing the Nevada District Attorneys Association:
We are here this morning in opposition to A.B. 160. With me at the table is Assistant District Attorney for Clark County, Christopher Lalli. He came to the Clark County District Attorney's office in 1994. In 2001, he joined the major violators unit, and began prosecuting capital cases. He is currently the assistant district attorney over the criminal and juvenile divisions of the Clark County District Attorney's office, and has served as assistant district attorney under two separate district attorneys. I will turn it over to Mr. Lalli. He has two people in Las Vegas who can also speak to this issue.

Christopher J. Lalli, Assistant District Attorney, Office of the District Attorney, Clark County:

With me in Las Vegas are two prosecutors, Robert Daskas, chief of our major violators unit, and Marc DiGiacomo, prosecutor on our murder team. They are very skilled and qualified capital litigators and they will speak with me in opposition to A.B. 160.

What exactly does this bill do? It tells prosecutors that we do not like the class of defendant against whom you are currently seeking the death penalty, and it eliminates some of those people from the class in their entirety or, more specifically, it makes it more difficult for prosecutors to seek the death penalty in the majority of cases in which we file; people like Javier Righetti.

Those of you from Clark County are probably familiar with Mr. Righetti's case. Those of you who are not from Clark County, indulge me to tell you a little bit about Mr. Righetti. He raped and murdered an Arbor View High School freshman in 2011 as she was returning from school one late afternoon, a young girl by the name of Alyssa Otremba. She was about 100 yards from the safety of her neighborhood when Mr. Righetti grabbed her, pulled her into the desert, stripped her clothing, and raped her repeatedly. He stabbed her about 80 times and then left her body in the desert. He returned, poured gasoline on her, and then burned her body. During the course of the investigation, the police learned that about a month earlier he had also sexually assaulted a classmate of Alyssa's. There were tunnels in the area of where this murder occurred by Arbor View High School, and the students of Arbor View had frequented this area. Mr. Righetti had strangled a high school student to the point of unconsciousness, dragged her into the tunnels, produced a knife, and raped her. Fortunately, her friends had come looking for her and were able to disrupt what was occurring, and she was able to get away. This case sent shock waves through Clark County. It disrupted the students at Arbor View.

To make this bill very, very real for all of you without going into the technical minutia of what Mr. Silverstein told you about, what this bill does is that of the 14 aggravating circumstances that were alleged against Mr. Righetti, it eliminates 8 of them. Eight of the 14 aggravating circumstances would be eliminated. That is just under two-thirds of the penalty case gone. Why is that important? Because when you get to the penalty phase of this case, a jury has to do a weighing process, and they weigh the aggravating circumstances against the mitigating circumstances, and when we get to a penalty hearing with the defense, they are not going to have three or four mitigating circumstances. They are going to have 20, 30, or 40 mitigating circumstances, and the number of aggravating circumstances are important.

This is not a bill that cleans a few things up. This is a bill that substantially affects the state's ability to impose the death penalty in the state of Nevada. That is what this bill does; make no mistake about it. Mr. Silverstein acknowledged this in his comments. He acknowledged that when this bill was before this Committee in the last session, 97 percent of death penalty cases would be affected by this bill. That is how this bill would profoundly affect death penalty litigation in the state of Nevada. This is not just a little cleanup measure. This bill profoundly affects the way death penalty litigation occurs in Nevada.

We certainly acknowledge that death is different and death penalty cases ought to be rare cases within the criminal justice system. I would certainly suggest to you that they are. We provided you with a chart (Exhibit D) that illustrates the rarity that death penalty cases are. We gathered statistics in the state of Nevada that between 1977 and 2011, there were 5,061 murders. During that same time period, there were 146 death sentences returned by juries. That is around 2.8 percent. Of all the murders that occur, you can see how incredibly infrequently a death sentence is actually returned. The important thing to keep in mind is that these are people going up to death row. These are not the people coming back from death row for a variety of reasons.

For example, negotiation is a trend that is occurring more and more in Clark County. There is a person who has been on death row for many, many years; a gentleman by the name of Edward Beets [Edward Beets vs. E.K. McDaniel, et al, Case No. 2:04-CV-00085]. I know about Mr. Beets because I worked on his case in the last year prior to returning to my position as assistant district attorney in Clark County. In his bid to receive relief in post-conviction petitions, he alleged a number of issues, one of which was mental retardation, which had been rejected before he introduced new and really compelling evidence. After looking at it again, we decided that the more appropriate action was to resolve Mr. Beets' case and to remove him from death row. So we negotiated that case, and he is no longer a death row inmate. The point of the 146 number is that it does not include cases that are negotiated, or people who are no longer on death row.

As I mentioned before, the key to a system of death verdicts or a death penalty system is a proper narrowing, and that is something that we have been doing in Clark County since 1995 under the leadership of then District Attorney Stewart Bell. We had the establishment of our Death Penalty Assessment Committee where we provided the great exercise of discretion as prosecutors. Prior to the establishment of that Committee in 1995, if there were aggravating circumstances present in a case, we simply filed the death penalty. But when Stewart Bell was the district attorney, we established a

committee and we exercised discretion as to whether or not we would file a death notice in a case.

Just over a year ago, Steven Wolfson was appointed district attorney in Clark County, and during his appointment process he testified before the Clark County Commission, and pledged that he would have a closer look at those cases in which the death penalty would be sought in Clark County. I can tell you, as his assistant district attorney over the criminal division, he has certainly stood by that pledge. There has been closer scrutiny of death penalty cases in Clark County.

In the Death Penalty Assessment Committee, which I am a member of, there has been a greater receptivity to the arguments presented by defense counsel. If you were to poll them, they will tell you this. I have had members of the defense bar come to me and tell me how refreshing it has been to appear before the Committee and to make presentations. We invite them to our death penalty assessment meetings, at which point they can present arguments, tell us what their mitigation is, tell us about their clients, what they found, and whether there are mental defects in these defendants so that we can make reasoned decisions as to seek the death penalty in various cases.

There has been a greater inclination to negotiate cases in which the death penalty has been filed, whether it be prior to trial or after conviction. I think Mr. Coffee acknowledged this in his comments. There has been a change of culture in Clark County with respect to the death penalty. I can tell you that Mr. Wolfson and myself have established a dialogue with the federal public defender, and there is now an understanding that in the federal habeas litigation stage of capital cases, if an issue develops that they truly believe warrants a discussion about resolving a case that is a death penalty case, we have now established an open dialogue where we can discuss the possibility of resolving issues.

Has that changed the number of pending cases? What do the statistics show? The statistics show that it has. There has been a lot of talk about the last time this bill was before this Committee. I believe it was at the request of the Legislative Counsel Bureau that I authorized the release of certain death penalty information from our office to the Legislature, and we provided a snapshot of our pending death penalty cases as of February 26, 2013. This information has changed since then, but this is just merely a snapshot. When this issue was last before the Committee, there were 80 pending death penalty cases. On February 26, 2013, there were 63, a decline of close to 20 cases. So you can see where that trend is going.

In 2010, under a prior administration, there were 23 pending death penalty cases. In 2012, in District Attorney Wolfson's—really his first year in office—there were five. You can see a dramatic change in where death penalty filings are headed. As of February 26, 2013, there was only one. That number has changed because as of last week, we had filed three additional cases; however, I know that there were a number of cases that have also dealt, so the number could actually be lower than 63 now. I am not certain of where the number is, so I think it is safer to just use the snapshot from February 26. When you use these statistics, you can see that things are certainly changing in Clark County.

Before I turn things over to the gentlemen in Las Vegas, I want to talk about cost. I heard a lot about cost. What does the death penalty cost the Clark County district attorney's office? It does not cost it anything. We are going to be litigating and trying murder cases whether they are capital cases or not. The cost to my office, quite frankly, is zero. To get wound up about the cost of capital litigation I think is somewhat of a misnomer. What I have found over the 20 years of being a prosecutor—and the vast majority of that being a capital litigator—is that murder is a cottage industry, and it is filled with psychologists, and fetal alcohol syndrome experts, excellent litigators, lawyers, experts, and forensic pathologists. All kinds of people make a lot of money off of this business. It is not just capital litigation. It is murder in general. It is the criminal justice system in general.

Many of you are businessmen and women and very successful at that, and you have done very well. It does not take a genius to figure out that when you take the death penalty off the table, these people are not going away. The cost of this is not going away. They are not going to go home. The lawyers are not going home. The experts are not going home. They are not going to open flower shops. The argument is just going to shift from death penalty litigation to life without litigation, and the arguments are going to be not that we are going to take someone's life, but that you are going put my client in prison for the rest of his life. You are effectively ending his life. So we are going to be here not testifying on death penalty litigation, but we are going to be testifying on life without litigation, and we are going to be doing the same thing again. I do not believe that the cost savings that everyone is talking about and touting is really going to be realized by anyone.

Assemblywoman Spiegel:
Concerning the chart that you gave us which shows the number of murders in Nevada from 1977 to 2011 and the number of death verdicts during that same period, have you done an analysis of the impact this bill would have on the

number of death verdicts based on the changes in the additional circumstances that are proposed in this bill?

Christopher Lalli:
I would only be able to speculate. As Mr. Silverstein testified, it would affect 97 percent of the cases. It would have a profound effect on those cases. We talk in terms of, "Well, you would still have an aggravator, so a person would be eligible." Sure, a person would be eligible, but would you get it? In the case of Mr. Righetti that I opened my comments with, in our notice of intent to seek the death penalty, right now we are alleging 14 aggravating circumstances. You just take eight of those and throw them away. Are we as well positioned to seek the death penalty if this bill were to pass? Certainly not. How would I predict what a jury would do with eight fewer aggravators? It is hard to say, but we would not be nearly as well positioned as we are now.

Assemblywoman Spiegel:
Let me rephrase the question. Do you know how many of those 146 cases would no longer have any aggravators, or have been ineligible? That is really the question. As I was hearing you speak, I thought, "Well, there are still three aggravators, so it would still be eligible." My question is, how many of those just would not be eligible at all?

Christopher Lalli:
You would have to go through every single case and determine what aggravators were alleged and compare them against this legislation. I do not have that figure; someone would have to go through all those cases and make that determination. It certainly could be done, but I do not have that information now.

Assemblywoman Cohen:
I appreciate the information you were giving us about the openness of the district attorney's office now to work with the defense bar and the committees, and the changes that have been happening with bringing forth the death penalty cases. Can you guarantee that that is going to continue to the next administration?

Christopher Lalli:
I can tell you that Steve Wolfson will be the district attorney for Clark County for many, many years.

Assemblywoman Cohen:
Can you guarantee me that he will not change his mind?

Christopher Lalli:
I certainly cannot speak for Mr. Wolfson that he is not going to change his mind. If you know Mr. Wolfson, I do not see this trend changing in Clark County as long as he is the district attorney.

Assemblyman Duncan:
We have talked a lot about the aggravators, but I am wondering about the district attorney's position on section 1 of the bill. I would like to get your thoughts on the record.

Christopher Lalli:
Section 1 is the section that does not allow for the reimpanelment of a jury, and simply gives a judge the ability to impose the panoply of potential sentences for murder. We are opposed to this section for a number of reasons. What we find in death penalty cases is that when a jury hangs in the penalty phase, it is usually because there is a single juror, or perhaps two jurors, that are hanging the penalty phase verdict up. It is not hanging between life without or life with, or they are not hanging between 50 years and life with. They are hanging between death and life without. That is where they are hanging out, and it is usually 11 for death and one for life without. It is my experience that although the person told everyone that he could follow through and return a death verdict, he just could not do it. So he, in fact, was not true to his oath and he was not true to what he told us in jury selection. There was a hung verdict, a hung jury, and there was a breakdown in the system.

The problem is two-fold. It does not allow for a remediation of the person who broke down and who could not follow through with his oath. You are creating all of these options when in reality what you have is a jury who is really considering two options, not all of these options.

Chairman Frierson:
Are there any other questions for Mr. Lalli? [There were none.]

Keith Munro, Assistant Attorney General, Office of the Attorney General:
We support the concerns raised by Christopher Lalli from the Clark County District Attorney's office.

Ronald P. Dreher, representing the Peace Officers Research Association of Nevada:
We are in opposition to A.B. 160, but I will start this by saying that I have the greatest respect for both Mr. Ohrenschall and Mr. Segerblom. I respectfully disagree with their positions on this bill for a number of reasons.

It does not achieve a deterrent because the death penalty is not carried out. We are not getting the bang for the buck. I have heard that comment several times. Mr. Lalli talked about some of the finances. What you have to understand is if a sentence is not carried out, yes, you are not getting the bang for the buck, and no, it is not a deterrent. You have all of these people on death row who have been on there for a long time, some of which I participated in putting them there as a major crimes detective with the Reno Police Department. The horrific murder that Mr. Lalli talked about is just one of many investigations that I participated in. One was a little girl—I am not going to go into the horrifics of that—and the other was the U-Haul murders of several years ago. The last person—one of the ones that voluntarily put himself on death row and had that sentence carried out—was the other half of that very horrific murder. I would love to show you pictures of, or let you listen to, the interview of what he wanted to do to the people.

I have listened to the bill, and I have looked at the bill, and I would agree with Mr. Lalli about section 1. You cannot change that and you should not change that. If you were going to change it, then give the judge the option of one thing. If you are not going to carry out the death penalty, life without is life without. And if life without was life without, then I would be opposed to the death penalty; however, it is not. Mr. Lalli talked about what is going to happen if you do away with the death penalty. Are you going to save any money? Absolutely not.

Chairman Frierson:
If I may interrupt you for a second, under what circumstances that you know of is life without, not life without in Nevada?

Ron Dreher:
Because of the appellate process, it just continues and continues and continues. They try to keep the people off of death row. Mr. Pescetta and I went with a bill last session about the death penalty, and we talked about the murder in the 1970s of police officer James Hoff. People are still on death row. In my opinion, life without is life without. It is not. You are going to have the appellate process and you are going to have the attorneys who, as Mr. Lalli said, make a very good living, and they are going to continue to make that. If you do away with the death penalty, you are not going to save a penny.

Chairman Frierson:
I do not want the Committee to be confused about good time credit or anything like that. It is my understanding, unless you can tell me otherwise, that in Nevada, a sentence of life without means life without, without any exceptions.

Ron Dreher:
It is my opinion that it is not life without, because they are going to continue to get the people out for any number of reasons. You have the aggravators and you have the mitigators. The same attorneys are going to be moving over from the death penalty cases to the life without cases.

Chairman Frierson:
I am sorry, but I cannot let my Committee be misled about the law regardless of our opinions about it. Is there some exception about life without that I am unaware of?

Christopher Lalli:
You are correct. In the state of Nevada, a sentence of life without the possibility of parole means life without the possibility of parole. That person would not be eligible for pardon or for parole under the current Nevada law.

Chairman Frierson:
I think Mr. Dreher is speaking about his feelings concerning the appellate process, which is a separate issue than the actual sentencing. We have members who have not been on this Committee before, and I do not want them to be misled about the state of the law itself.

Ron Dreher:
Thank you for clarifying that, because when we are looking at the law as it is, I would agree. When we are looking at it in reality, there are going to be the same attorneys that continue to get those people off. I would ask that the Committee look at the other sections in the bill which you have heard Mr. Lalli talk about. I went through this as well. Existing current language in the laws are the clarifying points to these other sections that you are seeing. Why take burglary out? Why remove an aggravator? Why, in section 2 of the bill, under subsections 5, 6, and 8, would you remove language that already has clarifying language and has been proven, but for the fact that you want to reduce these aggravators and make it a little bit harder for the prosecution to keep these people and put them away where they belong?

We are not talking about the nice people of the world; we are talking about the most horrific people around. I have to also do this, because I have not heard anyone get up here on behalf of law enforcement and speak of things that I speak about, and that is the victim; those little people who were killed, the big people who were killed, and most importantly, the survivors, who have to go on and on and on forever coming back to court and repeating what they have told over and over and over again. If you do away with the death penalty, then you

do away with the aggravators, and we go to life without, and you are still going to keep going and it is going to continue for these people.

Mr. Chairman, I started by saying that I was opposed, and I would ask this Committee to oppose A.B. 160.

Chairman Frierson:
Are there any questions for Mr. Dreher? [There were none.] Is there anyone else in Carson City who would like to testify in opposition to A.B. 160? [There was no one.] Is there anyone in Las Vegas who would like to testify in opposition to A.B. 160?

Robert J. Daskas, Chief Deputy District Attorney, Office of the District Attorney, Clark County:
I want to be very brief and give very pointed comments to hopefully answer a question that was posed by both Assemblywoman Spiegel and Assemblyman Duncan. The question they asked is, of the 146 or so cases, how many would be affected if A.B. 160 were passed? I would ask that question a slightly different way, which is, of cases pending right now that have not gone to trial, would any of those cases be affected if A.B. 160 were to pass? I would respectfully remind Mr. Silverstein of one of his clients.

He is a gentleman by the name of Michael Lane, who, in November of 2009, befriended a woman. Mr. Lane held himself out as a life coach and convinced his victim, a middle-aged woman, that he could come live with her and help her with whatever problem she was having. The result of it was that Mr. Lane killed this woman, Ginger Candela. After he killed her, he placed her body in a large garbage can, filled the garbage can full of bleach to try to dissolve her skin to bury her bones. When that did not work, he took an ax and put incised wounds all over the woman's body. When that did not work—and I apologize for the graphic nature of what I described, but this is a case; this is reality—Mr. Lane then took a saw and literally severed this woman in half. Completely severed her in half. This is someone that we prosecuted and Mr. Silverstein represents—effectively, I might add. After he did that, he robbed and tried to run over another victim. That is important, because if A.B. 160 were to pass, the three aggravators in Mr. Lane's case would be completely eliminated. Two of the aggravators involved a prior violent felony conviction, and as Mr. Silverstein said, as it stands now, we are allowed to allege that aggravator even if the violent felonies are contemporaneous with the murder. In Mr. Lane's case, they were. So if A.B. 160 were to pass, those two aggravators no longer apply, and even more significantly, if you were to pass A.B. 160, mutilation would no longer be an aggravator. So when Mr. Lane first placed Ginger's body in a garbage can, then in bleach to dissolve her skin, and

when he placed incised wounds on her body, and when he ultimately severed her in half, that aggravator would disappear. Mr. Lane would no longer be eligible for the death penalty. Although Mr. Silverstein says that A.B. 160 does not abolish the death penalty, he is right. But it certainly effectively abolishes it for some of Mr. Silverstein's clients that he represents as we speak.

Chairman Frierson:
Are there any questions for Mr. Daskas? [There were none.]

Marc DiGiacomo, Deputy District Attorney, Office of the District Attorney, Clark County:
My comments will be somewhat brief as Mr. Daskas' were, but there are certain things that were not exactly touched on. Some of it is in response to what Mr. Silverstein, Mr. Coffee, and Mr. Pescetta have said. When looking at crafting a death penalty statute, you want to craft one that is intellectually what you would want to protect your public. The changes I see in A.B. 160 are the opposite of that. Subsection 1 is a stopgap for something we all hope never happens. We do not like mistrials, and we do not want hung juries, but the odds are the hung jury is going to be from someone who violated his oath. The stopgap that is being placed in here is giving a benefit to someone because the system failed. Why should we give the criminal the benefit as opposed to reimpaneling a jury and letting a true verdict be decided?

Why would you change "The murder was committed by a person under sentence of imprisonment" in section 2, subsection 1? I heard that it was vague. That is not vague. The Nevada Supreme Court says that if you are a felon and you are under sentence of imprisonment—meaning you either have probation or you went to prison and now have parole—if you are still under that sentence, we expect you to behave yourself and not be killing people. So to change this, you would say we want to protect prisoners more than we want to protect the public. For example, a public defender client by the name of Melvin Collins, who got paroled nine times on a murder charge from 1978, killed a 67-year-old senior citizen while on parole for murder. That aggravator would fall away for him because he was not in prison when he choked out his victim. In a separate proceeding, I heard the argument that said, "Well, if he commits a robbery at the same time he commits a murder, we could use that as an aggravator." Well, no, actually you could not, but Mr. Silverstein, that would be a subsection 4 aggravator.

In a separate proceeding in Clark County right now, you have Mr. Hover and Mr. Freeman. Mr. Hover and Mr. Freeman kidnapped a woman out of the Hooters Hotel, took her out in the desert, then raped, stabbed, and strangled her. They then lit her body on fire. After that, they went on a series of armed

robberies. After that, they went on a home invasion and shot a man in the head, and then shot his wife in the head. The man died, and the woman lived. The argument there would be that you would lose any number of aggravators because all of their armed robberies and all of the other incidental crimes that occurred, in their trials that are coming up in a few months would no longer be an aggravator. Why does it matter whether or not it was a separate proceeding that convicted these individuals or not? What is the explanation for why we would do that?

For the two or more felonies, I would ask the question, "Why? Why would you want two or more felonies? Why do you have quantity over quality?" So a person who violently sexually assaults someone and has a felony prior would not be eligible for the death penalty, but some 16-year-old kid who had been certified on a couple of convenience store robberies, that would be a qualifying aggravator for him? Why would you change the language in that manner?

The language that is included in subsection 4—there are two changes, which I would ask, why would you do it? In subsection 4, paragraphs (a) and (b), why would you strike (b), "Knew or had reason to know that life would be taken . . . "? Take, for instance, Mr. Freeman in the Hooters Hotel example. He did not actually kill based upon the evidence that we have, although he stood outside the car and masturbated while his codefendant stabbed, strangled, and raped the woman. Why would you decide that that person did not deserve the death penalty based upon this? Or more importantly, as Mr. Silverstein has a client who is involved in the death of Officer Trevor Nettleton in Clark County, his client is not the killer, but he is the more senior gang member. If the more senior gang member puts the gun in the younger gang member's hand and tells that gang member—and I am not necessarily saying those are the facts in Mr. Nettleton's case, but it is generally the idea—to kill, why should the senior gang member not be eligible for the death penalty? Why does he have to be the person who pulls the trigger if he is morally more culpable?

They added language in here from *McConnell*, a decision which Mr. Owens did not say was overruled. It was criticized by *Cortinas v. State* [124 Nev. 1013, 195 P.3d 215 (2008)]. They said they would never have done it if they had ruled upon it in today's date but, based on stare decisis, have left it. This language is broader than *McConnell* will allow. We can submit *Cortinas* for purposes of the record, that the Nevada Supreme Court has distanced itself from *McConnell*.

The last subsection I would like to talk about is subsection 8, which Mr. Daskas talked about. I heard it said that this was merely a codification of

Nevada Supreme Court case law. Not exactly. In fact, the language is slightly different. Why did they choose to have different language than what the Nevada Supreme Court has decided? Absolutely none of these areas that were changed have been vague from anyone's standpoint. None of this changes cases that are already there. They are going to be litigated and we will be litigating these changes now as part of the death penalty. This is not at all going to save any money for cases currently in the system. Making these changes, and forcing us to litigate these changes, is really going to increase the amount of money that defense attorneys are going to make from litigating, whether or not we have complied with the new requirements as opposed to relying upon the Nevada Supreme Court opinions that are absolutely crystal clear about when these aggravators apply. For that reason, in addition to those given by the other individuals who spoke in opposition, I would add my opposition as well to this bill.

Assemblywoman Spiegel:
If someone is sentenced to life in prison without the possibility of parole, how many additional appeals of that sentence are they entitled to? Are they entitled to appeal it at all? Do they get one or multiple?

Marc DiGiacomo:
There is the practice versus the theoretical. Mr. Pescetta, who is involved in this, only does the capital side, but in his office there are people who work on the life without. Anyone who gets convicted of any crime by way of a jury, or by plea, is entitled to their direct appeal to the Nevada Supreme Court. Then anyone who is under sentence of imprisonment has a right to file a petition for a writ of habeas corpus in district court saying there was some error. Usually it is "my counsel was bad." They can appeal that denial to the Nevada Supreme Court. Once exhaustion occurs, there is federal court that anyone under sentence of imprisonment can go to. They go to a federal district court, and if that federal district court denies it, there are some appellate rights from that federal district court. The litigation can go on for years and years and years. By making it a death case, the only thing that changes is that you are getting lawyers to help you through those processes throughout, as opposed to individuals who have received life without the possibility of parole. You will get some lawyers, but you will not get as much legal assistance in life without cases that you do in death cases. All of that comes from the defense side. From our side, there is no difference in resources that are being expended.

Chairman Frierson:
Are there any other questions? [There were none.] Is there anyone else in Las Vegas to testify in opposition? [There was no one.] I will invite anyone to

offer testimony in a neutral position both in Carson City and Las Vegas. [There was no one.] Mr. Ohrenschall, would you come up for closing remarks?

I appreciate the presentation. For those of you who do not know, the individuals that litigate these issues are professionals, and as passionate as these issues are, when they say, "my friend," they mean it. Everyone here works together, and I happen to know all of them. It is interesting for me to see it, and I want to make sure that everyone knows that these are true professionals that care about this issue, and carry out their jobs with professionalism. I appreciate it.

Assemblyman Ohrenschall:
I would like Mr. Silverstein to address a couple of the points that he is better suited to address than I am.

Dan Silverstein:
With respect to one of the points made by Mr. Lalli that there is already a narrowing function performed; it is sort of a red herring. The narrowing function that the U.S. Supreme Court talked about that the aggravating circumstances are to perform is a narrowing function of the statute itself. A narrowing function of the law, not a narrowing function of the person who is elected district attorney, the person who is in charge of enforcing the law. If the statute did a proper narrowing, we never would have gotten to 80 death penalty cases in the first instance. David Roger would not have been able to run us up to the number one death penalty state per capita in the nation if we had a proper statute that properly narrowed and performed the function. So when he says that we already have this narrowing because we have a new district attorney and we have less death penalty cases—I acknowledge that. Mr. Wolfson absolutely has filed death penalty cases at a much lower rate than his predecessor. As Assemblywoman Cohen pointed out, what happens with the next district attorney? What happens if the next district attorney decides that he wants to take us back to the 80, 90, or 100 pending cases? This statute allows him to do that. It is the statute that must perform the narrowing function, not the man in the office.

Assemblyman Ohrenschall:
I think it is plain to see the statute is not working when you look at how many people have been sentenced to death, and the fact that since 1975 we have had 12 executions and 11 of those were volunteers. Obviously, as Mr. Silverstein said, the narrowing process is not working. We heard many examples of some terrible crimes, and I never heard a specific cite that any of those folks could not be prosecuted under this. I think maybe there was one that Mr. DiGiacomo mentioned. I was going through the aggravators, and

I think that might be open to debate. I think if you are going to have capital punishment, A.B. 160 really does tailor it so you are not going to have so many people sitting on death row. Right now I do not think the system is working. I appreciate the Committee taking the time to look at this bill, and hope the Committee considers processing it.

Chairman Frierson:
I will close the hearing on A.B. 160. I will briefly allow the opportunity for any public comment if there is anyone either in Carson City or Las Vegas. [There was no one.] Today's hearing of the Assembly Judiciary Committee is adjourned [at 11:15 a.m.].

RESPECTFULLY SUBMITTED:

_____
Linda Whimple
Committee Secretary

APPROVED BY:

_____
Assemblyman Jason Frierson, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: March 18, 2013 **Time of Meeting: 9:10 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B. 160	C	Nancy Hart	Testimony
A.B. 160	D	Christopher Lalli	Chart